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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 512

NELSON NOEL,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Question Presented	1
Constitutional and Statutory Provisions Involved	2
Statement of Case	4
Argument	7
I. The overruling of petitioner's motion to produce a written statement given by a witness for the prosecution to the police for petitioner's use in cross-examining such witness did not violate the Confrontation Clause	7
Conclusion	10

CITATIONS AND AUTHORITIES

Cases: Page

Jencks v. *United States*, 353 U.S. 657 (1957) 7, 8

Palermo v. *United States*, 360 U.S. 343 (1959) 8

People ex rel. Lemon v. *Supreme Court*, 245 N.Y. 24, 156 N.E. 84, 52 A. L. R. 200 (1927) 9

Pointer v. *Texas*, 380 U.S. 400 (1965) 9

Rosenberg v. *United States*, 358 U.S. 904 (1958) 8

Rosenberg v. *United States*, 360 U.S. 367 (1959) 8

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QUESTION PRESENTED

Respondent restates the question presented, as follows:

1. Whether the state trial court's denial of defendant's motion for production of a signed statement of a witness for the state, in possession of the prosecutor, for inspection and use in the cross-examination of such witness violated the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent sets forth the following statute in addition to those set forth in the Petition:

18 U.S.C. § 3500:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> "(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which does not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such

statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT OF CASE

Petitioner, Nelson Noel, was convicted of enticing a female into an immoral place and sentenced to two to fourteen years in the Indiana State Prison on December 2, 1964. The State's evidence was as follows:

Noel first contacted a girl named Stella Mae Dyer, age nineteen, the first part of July, 1964, at her house. He asked her at that time if she wanted a job as a waitress at Kay's Truck Stop, a restaurant in Plainville, Indiana. (Tr. 153). The girl said that she did and went with Noel to the restaurant in a school bus, painted black, which the latter was driving. Enroute to the restaurant they stopped and had sexual intercourse on a bed in the rear of the bus. (Tr. 154-155). The girl further testified that after arriving at the restaurant, Noel "talked to some guys about me that I was good stuff and all that and that is where it started in the prostitution deal." (Tr. 155).

She testified that Noel "told me the price to take from the men" and that "he had already talked to the person I was supposed to have intercourse with and told him what the price was." (Tr. 156). The price was to be $7.00 per man. (Tr. 156).

On that occasion the girl, Stella Mae Dyer, had intercourse with seven or eight different men in Noel's converted school bus and all paid her. (Tr. 157). Out of the money received she gave the woman at the restaurant $1.00 for each man and gave the remaining sum to Noel who gave some of it back to her. (Tr. 158).

Stella Mae Dyer accompanied Noel to the restaurant on another occasion and indulged in the same activities. (Tr. 159).

Upon becoming pregnant, she decided to quit prostitution. (Tr. 160). Noel asked her for the names of other girls, and she gave him the names Virginia Rose, Joan Adams, and Ruby Thompson. (Tr. 161).

Noel, accompanied by Stella Mae Dyer, in the school bus, went to see Alice Joan Adams at her home sometime in July, 1964. (Tr. 79). Noel offered the girl a job as a prostitute on his bus. (Tr. 80 and Tr. 161). Noel told her the charge was $7.00 per man and that she could make $60.00 per night. Joan Adams was only seventeen years old at the time, of which Noel was aware. (Tr. 162). Noel also asked her if she knew of any other girls for such work. Joan Adams said she did and sent them to another girl's home. (Tr. 81).

Subsequent to this meeting, Joan Adams agreed to help the police apprehend Noel. (Tr. 96).

Arrangements were made between Noel and the two girls, Joan Adams and Gloria Ann Abrell, the latter being twenty years of age, to meet Noel at a place called Bald Knob on the night of August 5, 1964, to work as prostitutes for the night in Noel's converted school bus. (Tr. 81). The plans had been changed to the night of August 5 because Noel's bus had broken down on the previous night scheduled for the operation. According to the plan, after arriving at Bald Knob, Noel would have intercourse with the two girls to "try them out" and check them for disease. (Tr. 85). After this, Noel planned to take them to Kay's Truck Stop to indulge in prostitution in the bus. (Tr. 165).

On the evening of August 5, 1964, Joan Adams and Gloria Abrell met Noel and Stella Mae Dyer at Bald Knob. The two girls parked the car they were driving and boarded

Noel's converted bus. (Tr. 86 and Tr. 166). Thereupon the police came out of the corn field, where they had been hiding, and placed Noel under arrest. (Tr. 87 and Tr. 142).

On the day of the arrest Joan Adams gave the police a signed statement which petitioner claims to be inconsistent with her testimony at the trial. (See Appendix D to Petition). During the cross-examination of Joan Adams, counsel for Noel moved for production of the statement. The motion was denied. (Tr. 107). The jury found Noel guilty. His conviction was thereafter affirmed by the Supreme Court of Indiana.

ARGUMENT

I.

THE OVERRULING OF PETITIONER'S MOTION TO PRODUCE A WRITTEN STATEMENT GIVEN BY A WITNESS FOR THE PROSECUTION TO THE POLICE FOR PETITIONER'S USE IN CROSS-EXAMINING SUCH WITNESS DID NOT VIOLATE THE CONFRONTATION CLAUSE.

During the cross-examination of Joan Adams, counsel for petitioner moved for production of a statement given by her to the police shortly after Noel's arrest. The trial court properly overruled the motion. Petitioner asserts that such a denial of production violates the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

The thrust of petitioner's argument is that *Jencks v. United States,* 353 U.S. 657 (1947), has constitutional underpinnings. Such a contention must be rejected in light of this Court's activity in the production area of the law.

This Court in the *Jencks* case held "that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial." 353 U.S. 672. The defendant in that case was prosecuted under 18 U.S.C. § 1001 for falsely swearing by affidavit that he was not a member of the Communist Party. The crucial testimony against him was given by two paid undercover agents for the F.B.I.,

who stated on cross-examination that they had made regular oral or written reports to the F.B.I. on the matters about which they had testified. The trial court denied the defendant's motion for production of the reports for inspection by the court for possible use in impeaching their testimony. The Constitution is nowhere mentioned in this Court's opinion in that case.

In granting certiorari in *Rosenberg v. United States,* 358 U.S. 904 (1958), this Court limited argument to two questions one of which was whether *Jencks v. United States, supra,* involved a rule of mere procedure or one of constitutional rights. In the decision on the merits however, *Rosenberg v. United States,* 360 U.S. 367 (1959), no mention was made of the constitutional question. The case was decided on the basis of the Jencks Act, 18 U.S.C. § 3500, and not the Constitution. Mr. Justice Frankfurter, speaking for the Court, said:

> ". . . We have today held in *Palermo v. United States, ante,* p. 343, that since its enactment 18 U.S.C. (Supp. V) § 3500 and not the *Jencks* decision governs the production of statements of government witnesses for a defendant's inspection at trial." 360 U.S. 369.

The Jencks Act, 18 U.S.C. § 3500 was enacted by Congress subsequent to this Court's decision in *Jencks v. United States, supra.*

This Court did, in essence, in *Palermo v. United States,* 360 U.S. 343 (1959), reject the theory that the *Jencks* case was grounded in constitutional law when it said:

> "Exercising our power, in the absence of statutory provision, to prescribe procedures for the adminis-

> tration of justice in the federal courts, this Court, on June 3, 1957, in *Jencks v. United States,* 353 U.S. 657, decided that the defense in a federal criminal prosecution was entitled under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses." 343 U.S. 345.

It is clear that the *Jencks* rule merely involved a rule of discovery propounded by this Court acting in its supervisory capacity over federal criminal prosecutions. Such rules of production and inspection did not have their growth in the common law, but grew out of the bill of discovery in equity. As pointed out by Mr. Justice Cardozo in *People ex rel. Lemon v. Supreme Court,* 245 N.Y. 24, 156 N.E. 84, 52 A.L.R. 200 (1927), modern discovery statutes borrowed from this equitable device. There is neither an historical or constitutional basis for the *Jencks* rule. It is not embodied in the Confrontation Clause of the Sixth Amendment. The right to confront one's accusers and witnesses does not include the right to search the State's files for evidence to attack the credibility of the State's witnesses.

The question of discovery in criminal cases is one that must be resolved in the legislative chambers as Congress did in enacting Section 3500.

Pointer v. Texas, 380 U.S. 400 (1965) is clearly distinguishable from the case at bar. There the accused was denied cross-examination of his accuser where the evidence consisted of a transcript of the witness's testimony at the preliminary hearing. Here the accused, by counsel, did cross-examine the State's witnesses. Whether his cross-examination of Joan Adams would have been more effective

with her prior statement is a matter of conjecture and trial strategy analysis. It does not, however, amount to a denial of confrontation by one's accusers.

CONCLUSION

Petitioner has failed to present a question of sufficient merit under Rule 19 of this Court to warrant review of the decision of the Indiana court.

WHEREFORE, respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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